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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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In the Matter of the Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation	)	Docket No. T-01051B-03-0668

ESCHELON TELECOM OF ARIZONA, INC.'S RESPONSE TO MOTION TO DISMISS AND, OR IN THE ALTERNATIVE, REQUEST FOR ADDITIONAL TIME FOR DISCOVERY

I. INTRODUCTION

On September 11, 2003, Eschelon Telecom of Arizona, Inc. ("Eschelon") filed its Complaint which includes a claim by Eschelon that it is entitled to the same rate for an unbundled network element platform known as UNE-Star[1] as that paid by one of its

[1]The service at issue is known as UNE-E when applied to Eschelon, UNE-M when applied to McLeod or generically as UNE-Star. UNE-Star is the general term used to refer to UNE-M and UNE-E. Throughout this Response, Eschelon will use the term UNE-Star.

competitors, McLeodUSA ("McLeod"). On October 6, 2003, Qwest Corporation ("Qwest") filed a Motion to Dismiss and Answer. Eschelon hereby files this response to Qwest's Motion and incorporates its Complaint by reference.

Eschelon's Complaint alleges three bases for its contention that it is entitled to the same rate for UNE-Star as the rate provided to McLeod. First, Eschelon is entitled to that rate pursuant to Section 252(i) of the Telecommunications Act of 1996 (the "Act"), often referred to as the "opt-in" or "pick and choose" provision of the Act. Second, Eschelon is entitled to those rates under Section 252 of the Act and A.R.S. §§ 40-248, 40-334, and 40-361, which require that Qwest make UNE-Star available at nondiscriminatory rates. Third, Eschelon is entitled to these rates pursuant to its Interconnection Agreement ("Agreement"), which provides that Qwest must provide network elements to Eschelon on rates, terms and conditions no less favorable than those provided to itself or any other party. *See* Agreement, Attachment 3, Sections 2.1 and 2.9.1 (Exhibit 1 to Complaint).

II. QWEST HAS NOT DEMONSTRATED A VALID BASIS FOR DISMISSAL

Qwest's Motion to Dismiss is based on two grounds—that the Commission lacks jurisdiction over the dispute and that Eschelon has failed to state a claim on which relief can be granted. As will be shown, neither ground is valid.

Motions to dismiss for failure to state a claim are not favored under Arizona law. *See Maldonado v. Southern Pac. Trans. Co.*, 129 Ariz. 165, 167, 629 P.2d 1001, 1003 (App. 1981). Such a motion should not be granted "unless it appears certain that the

plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated." *Sun World Corp. v Pennysaver, Inc.*, 130 Ariz. 585, 586, 637 P.2d 1088, 1089 (App. 1981). Indeed, a litigant making a motion for dismissal on the ground of failure to state a claim admits "the truth of all the well-pleaded facts alleged in the complaint." *Folk v. City of Phoenix*, 27 Ariz. App. 146, 149, 551 P.2d 595, 598 (1976).

Qwest has not justified dismissal. To the contrary, Eschelon's claim is fully supported by the facts and the law.

III. THE COMMISSION HAS JURISDICTION OVER ESCHELON'S COMPLAINT.

Eschelon has clearly alleged facts that establish a claim under the Commission's jurisdiction. The Complaint is quite simple. Eschelon asked to opt-in to a McLeod interconnection agreement amendment pursuant to Section 252(i) of the Act. Qwest refused that request, demanding that Eschelon agree to other terms in the McLeod agreement that were not legitimately related to the portion of the agreement requested by Eschelon. Qwest's refusal is contrary to Section 252(i) and results in rates that are discriminatory in violation of state and federal law.

In its Motion and Answer, Qwest alleges that this Commission does not have jurisdiction under the Act because "Eschelon has not asked for the enforcement of an interconnection agreement." This is incorrect. Eschelon has requested enforcement of Attachment 3, Sections 2.1 and 2.9.1 of the Agreement and has invoked Part A, Section

27.2, which is a dispute resolution provision of the Agreement. Complaint ¶¶ 12, 27. Therefore, 47 U.S.C. §§ 252(b), (c) and (e) confer jurisdiction upon the Commission.

Qwest next asserts that the Commission lacks jurisdiction under 47 U.S.C. § 252(i) and 47 C.F.R. 51.809 because "Eschelon has not sought to opt into the McLeod agreement without modifying its terms." This is incorrect on two levels. First, Eschelon's request did not include any request to modify the terms of the McLeod agreement. Second, as will be shown, the Act and the FCC's rules do not require that one must accept all terms of an agreement in order to opt into a portion of it. As will be shown, Qwest has the burden of showing that any other terms it insists upon are legitimately related to the provisions opted into by Eschelon. The FCC has made it clear that it is the state commissions that should examine these opt-in issues in the first instance. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶1321 (1996) ("First Report and Order") ("Since agreements shall necessarily be filed with the states pursuant to 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.") This Complaint is clearly a complaint about Eschelon's opt-in rights under Section 252(i) of the Act and thus jurisdiction is conferred upon this Commission.

Finally, Qwest asserts that Eschelon has not stated a claim for discrimination and that this Commission has no jurisdiction over Eschelon's complaint about discriminatory rates. This claim is absurd on its face. The most basic of the undisputed facts is that Eschelon has paid a higher rate for UNE-Star than McLeod, despite Eschelon's request for

the McLeod rate. Eschelon contends that this constitutes unreasonable and unlawful discrimination. Unreasonable discrimination under the Act is determined by considering: (1) whether the services are "like," (2) if so, whether the services were provided under different terms or conditions, and (3) whether any such difference was reasonable. *National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 127 (2nd Cir. 2001). The courts have recognized that because two services are "like," such that they shared a "functional similarity," there was "good cause to suspect that there was little justification for [a] large difference in the rates charged [.]" *Id.* at 130 (quoting *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1017-18 & n.11 (2d Cir. 1977)) (internal quotations omitted). That is exactly the case here.

Section 252 of the Act and A.R.S. §§ 40-248, 40-334 and 40-361 require non-discriminatory rates and give the Commission jurisdiction over such complaints. Furthermore, the Commission has explicit authority to order Qwest to provide UNE-Star to Eschelon at the same rate and for the same time period as McLeod and to order reparations pursuant to A.R.S. § 40-248.

Therefore, there is no basis to dismiss Exchelon's complaint for lack of jurisdiction.

III. THE FACTS DO NOT SUPPORT QWEST'S CLAIMS.

Qwest's Motion claims that there is no factual basis for Eschelon's Complaint for three reasons: (1) Qwest did not refuse to provide McLeod pricing to Eschelon; (2) Eschelon's agreement contains different terms than McLeod's; and (3) Eschelon refused to negotiate a different agreement.

The first reason is clearly incorrect. If Qwest did not refuse to provide McLeod pricing to Eschelon, Eschelon would have no reason to bring its Complaint. As stated in the Complaint, and as the facts will show, Qwest refused Eschelon's opt-in request. If Qwest is now willing to agree to Eschelon's October 29, 2002 opt-in request for McLeod pricing, this Complaint can be dismissed. However, to date Qwest has refused that request. Indeed, a careful reading of Qwest's Motion and Answer demonstrates that Qwest does not deny this. Rather, Qwest asserts that it offered to negotiate a different agreement from the one requested by Eschelon. A basic tenet of contract law, however, is that a counteroffer is a rejection of the original proposal. *See Hargrove v. Heard Inv. Co.*, 56 Ariz. 77, 80, 105 P.2d 520, 521 (1940). Qwest's offer to negotiate a different agreement than the one requested was a rejection of Eschelon's request.

Although the second reason offered by Qwest is true, it provides no basis for dismissal. Obviously, the McLeod and Eschelon agreements differ. The issue to be decided in this case, however, is whether those differences are relevant and legitimately related to the portion of the agreement into which Eschelon requests to opt-in. If those differences are not legitimately related to Eschelon's request, then they do not provide a valid reason for Qwest to deny Eschelon's opt-in request.

The third reason given by Qwest is not relevant—whether Eschelon is willing to negotiate a different agreement from the one it requested to opt into is not relevant in any respect to Eschelon's Complaint. It is not a prerequisite under Section 252(i) that Eschelon attempt to negotiate a different agreement with different terms than the one it

requested to opt into. As the FCC has stated: "We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement." First Report and Order at ¶ 1321.

The basic facts of this case are evidenced by the correspondence between the parties. On October 29, 2002, Eschelon made a very simple and direct request to Qwest: "Eschelon requests to opt-in to page 2 of the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003." *See* Exhibit 6 to Complaint. On November 8, 2002, Qwest responded that it was not required to honor Eschelon's request because the request did not include the same terms and conditions as the McLeod agreement, including the volume commitments. *See* Exhibit 7 to Complaint. Qwest, however, did offer to negotiate for different terms pursuant to its reading of the applicable law. This, of course, is a rejection of Eschelon's request — the very rejection that forms the basis of Eschelon's Complaint. It is the validity of that rejection that is at issue in this matter, not the other terms to which Qwest or Eschelon might have agreed.

It should also be noted that Eschelon followed these letters with another letter on January 16, 2003, repeating its request. *See* Exhibit 7 to Complaint (Qwest letter dated February 14, 2000). On February 14, 2003, Qwest again denied Eschelon's request: "Qwest will allow Eschelon to obtain the McLeod rates, but to obtain the rates, Eschelon

must also opt-in to the same service (and associated terms and conditions) to which those McLeod rates apply." *Id.*

As Eschelon has alleged in its Complaint, and as will be shown, the terms and conditions that Qwest demanded Eschelon accept are not legitimately related to the portion of the agreement that Eschelon wishes to opt into and therefore cannot be a valid reason for denying the request. The core issue to be determined in this case is whether that rejection was justified under the law and the facts. Thus, there is no basis for a dismissal of Eschelon's Complaint for failure to state a claim.

IV. ESCHELON IS NOT REQUIRED TO TAKE ALL TERMS OF THE MCLEOD AGREEMENT IN ORDER TO PICK AND CHOOSE A TERM.

Qwest's Motion appears to be based upon the faulty premise that one requesting to opt-in must take all the terms of the underlying agreement no matter how unrelated they may be. This is not the law. As the Supreme Court stated in upholding the FCC's "pick and choose" rule: "[T]he Commission [FCC] has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are 'legitimately related' to the desired term . . . . Section 252(i) certainly demands no more than that." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396, 119 S. Ct. 721 (1999).

Likewise, in response to a similar argument by Southwestern Bell that a CLEC could only opt-in to the provisions of an existing agreement if the CLEC seeks no additions or changes to that agreement, the Firth Circuit held that an ILEC can only require the CLEC to "'accept all terms that [the ILEC] can prove are legitimately related

to the desired term.'" *Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 818 (5th Cir. 2000) (quoting *AT&T Corp.*, 525 U.S. at 396) (emphasis added). Thus, the terms must be legitimately related and it is Qwest's burden to prove that fact. As another court has noted, this result is "fully consistent with the plain terms of the statute itself and with the statute's purpose of promoting a level playing field as between different competitors." *AT&T Communications of Southern States, Inc. v GTE Florida, Inc.* 123 F.Supp.2d 1318, 1327 (N.D. Fla. 2000). Thus, the issue in this case is whether Qwest can prove that it has any legally justified reason for denying Eschelon's request.[2] Qwest has not done so.

V. QWEST'S OTHER ALLEGATIONS ARE INCORRECT AND DO NOT SUPPORT DISMISSAL.

Qwest also makes several statements that are factually incorrect. For example, it alleges that Eschelon's request will somehow give Eschelon the McLeod pricing for a term longer than the term contained in the McLeod agreement. To the contrary, that was not what Eschelon originally requested, nor would it be the result of Eschelon's Complaint. Eschelon has asked for the rates in question for the same time period as McLeod—September 20, 2002 to December 31, 2003. *See* Exhibit 6 to Complaint. The issue, therefore, is whether Eschelon is entitled to the McLeod pricing for the same term contained in the McLeod agreement, not for a longer term.

[2] A similar Complaint is before the Minnesota Public Utilities Commission. On September 4, 2003, the Administrative Law Judge ruled in Eschelon's favor. A copy of the Administrative Judge's Recommendation is attached as Exhibit 1.

Qwest claims that the termination date of the McLeod agreement is related to the price and that "[c]ommon sense dictates that the term of the agreement must be integrally related to the prices contained in the agreement." But, as stated, Eschelon is requesting McLeod pricing for the same term as McLeod. Thus, even if that allegation were true, it would not support Qwest's case. Furthermore, McLeod's prices would appear, on their face, not to be integrally related to the term. When Qwest significantly reduced McLeod's prices for UNE-Star by agreeing to the amendment in question, it did not change the term at all. Qwest offers no explanation for how the rate, which it claims is integrally related to the term, could be reduced significantly without any change in the term.

Qwest also claims that Eschelon's request for what it calls a "backdated" effective "date and refund" is not properly before the Commission. However, Qwest provides no clear basis for this assertion except that Eschelon has "not even attempted to properly opt-in or negotiate an amendment." Whether Eschelon's opt-in request is proper, however, is one of the issues for the Commission to decide in this case. Furthermore, there is no backdating involved. Eschelon has requested to opt into the McLeod pricing amendment, which states that the prices are "effective on September 20, 2002 and ending December 31, 2003." This was part of Eschelon's opt-in request, and the Commission has the authority to require Qwest to comply.

VI. REQUEST FOR ADDITIONAL TIME TO TAKE DISCOVERY.

As set forth above, Qwest's Motion to Dismiss is without basis and should be denied. Furthermore, the affidavit and other exhibits relied upon by Qwest in support of

its Motion should be excluded by the Court as they are matters outside the Complaint. If, however, the Commission wishes to consider these matters at this juncture, the Motion should be treated as a motion for summary judgment, and Eschelon should be given the opportunity to take additional discovery and to present additional evidence in response. *See* Ariz. R. Civ. P. 12(b); 56(f).

As set forth in the Declaration filed with this Response, Eschelon believes that additional discovery will further support its claim and strengthen its opposition to Qwest's motion. Accordingly, if the Commission determines that Qwest's Motion to Dismiss should be treated as a motion for summary judgment, Eschelon requests the opportunity to take additional discovery to oppose the motion and to support its claim. In addition, Eschelon requests, pursuant to AAC R14-3-108, that a preliminary conference be set to allow for scheduling of discovery and further briefing.

CONCLUSION

Qwest has made no showing justifying the dismissal of Eschelon's Complaint. To the contrary, both the facts and the law dictate a ruling for Eschelon. Qwest's Motion to Dismiss should be denied. In the alternative, if the Commission does consider the matters outside the Complaint presented by Qwest, Eschelon should be granted an opportunity to take discovery to present all evidence relevant to its claim.

LEWIS AND ROCA LLP
LAWYERS

DATED this 24th day of October, 2003.

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ORIGINAL and thirteen (13) copies of the foregoing filed this 24th day of October, 2003, with:

The Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
Phoenix, Arizona 85007

COPIES of the foregoing hand-delivered this 24th day of October, 2003, to:

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EXHIBIT 1

P-421/C-03-627 15-2500-15426-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

RECOMMENDATION DENYING MOTION FOR SUMMARY DISPOSITION

In the Matter of the Complaint of
Eschelon Telecom of Minnesota, Inc.
Against Qwest Corporation, Inc.

On July 15, 2003, Qwest Corporation, Inc. ("Qwest") filed a Motion for Summary Judgment, requesting that Eschelon Telecom of Minnesota Inc.'s ("Eschelon") Opt-In Claim be dismissed. The final submission concerning the motion was received on August 8, 2003.

Jason D. Topp and Joan C. Peterson, Attorneys at Law, 200 South Sixth Street, Room 395, Minneapolis, MN 55402, appeared on behalf of Qwest Corporation. Dennis D. Ahlers and Brent L. Vanderlinden, Attorneys at Law, 730 Second Avenue South, Suite 1200, Minneapolis, MN 55402-2456, appeared on behalf of Eschelon Telecom, Inc. Steven H. Alpert, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Department of Commerce.

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED:

1. That Qwest's Motion for Summary Judgment be denied. Eschelon has properly asserted a claim for denial of its opt-in rights under the Telecommunications Act of 1996, and the Public Utilities Commission has jurisdiction to resolve it.

2. That Eschelon may opt into that portion of the interconnection agreement between Qwest and McLeod providing for a price of $24.50 for UNE-Star services, but only for the duration of the agreement with McLeod.

3. That the PUC has the authority to require Qwest to provide a refund to Eschelon for the lower rate from the date of Eschelon's request.

Dated this 4th day of September, 2003.

BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

I. Background

Congress enacted the Telecommunications Act of 1996 to foster competition in local telephone service. It imposed certain requirements on incumbent local exchange carriers (ILECs), such as Qwest, to facilitate competing telecommunications carriers entering the market. ILECs must provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale. Section 252 of the Act sets out the procedures for an incumbent carrier to negotiate a voluntary agreement with a competing carrier. Such agreements must be submitted for approval to the appropriate state utilities commission, and are subject to enforcement by the states.[1] In this case, Qwest has entered into separate interconnection agreements with McLeodUSA ("McLeod") and with Eschelon, and those agreements have been approved by the Public Utilities Commission (PUC).

The Act also requires an ILEC to make available to any other carrier the services it provides under a negotiated agreement, under certain conditions. No negotiation is required for a competing carrier to exercise this opt-in right. A competing carrier may "pick and choose" from the services, so long as it selects the service under the same terms and conditions set forth in the agreement.

Eschelon filed a complaint with the PUC on April 23, 2003, alleging, *inter alia*, that Qwest charges Eschelon higher rates for a service known as UNE-Star[2] than Qwest charges to one of Eschelon's competitors, McLeod, for that service. Eschelon claims that this practice violates its opt-in rights under 47 U.S. C. §§ 252(i) and 252(c)(2)(D), as well as Minn. Stat. §§ 237.06, 237.121 and 237.121(a)(4). Eschelon maintains it is entitled to the lower rate from the McLeod agreement dating back to the time of its request for the rate.

Qwest contends that Eschelon's claim is not properly characterized as a denial of opt-in rights, because Eschelon refuses to accept other terms and conditions of the McLeod agreement that it maintains are related to price, such as duration of the agreement . Qwest argues that because Eschelon's claim is not aimed at enforcing opt-in rights, it must instead engage in negotiations to amend the interconnection agreement. Qwest seeks dismissal of the opt-in claim and an order directing the parties to negotiate an amendment to their agreement under 47 U.S.C. § 251(c).

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[1] 47 U.S. C. § 252 (e).

[2] UNE-Star is a generic term; it is known as UNE-E when applied to Eschelon and UNE-M when applied to McLeod.

In addition, Qwest maintains that Eschelon's allegations that it has violated state and federal law by denying opt-in rights must be dismissed for lack of merit, and it further characterizes Eschelon's request for a retroactive adjustment of the UNE-Star rate as one for "damages," which it maintains the PUC has no jurisdiction to consider.

Eschelon asserts that it is attempting to opt into the McLeod agreement; that the termination date of the McLeod agreement is not related to the price of the UNE-Star offering, so it is entitled to the lower price for the term of its own agreement with Qwest; and that, even if the McLeod termination date is related to the price, Eschelon is entitled to the lower price for the term of the McLeod agreement, or until December 31, 2003. Eschelon further contends that it seeks only a nondiscriminatory rate from the time of its request under Minn. Stat. § 237.081, that it does not seek "damages" as characterized by Qwest, and that the PUC has broad authority to require a refund of a discriminatory rate.

Since the administrative law judge makes a recommendation to the PUC rather than issuing a final order and entering judgment, the rules of the Office of Administrative Hearings characterize such a motion as a motion for summary disposition.[3]

II. Standard for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[4] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.[5]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.[6] To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[7]

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,[8] and all doubts and

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[3] Minn. R. 1400.5500 (K).
[4] Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwgie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.
[5] See Minn. R. 1400.6600.
[6] Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Department of Pub. Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).
[7] Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).
[8] Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

factual inferences must be resolved against the moving party.[9] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[10]

In this case, Qwest and Eschelon agree that the material facts are not in dispute. The parties submitted simultaneous briefs on this issue pursuant to the Prehearing Order, and although Eschelon does not specify any procedural basis for its arguments, it contends that the issue concerning the nature of the opt-in claim should be resolved because the facts are undisputed.

III. Statement of Facts

The following material facts are not in dispute.

1. Eschelon and Qwest entered into an Interconnection Agreement (ICA) that was approved by the PUC on October 4, 1999.[11]

2. On October 1, 2000, Qwest and McLeod entered into the Eighth Amendment to their ICA.[12] That Amendment was filed with the PUC on December 20, 2000, and approved on January 26, 2001.[13] The Amendment provided UNE-M to McLeod at a rate for Minnesota of $27.00.[14] The rate expires on December 31, 2003, but will automatically continue until either party gives at least six (6) months advance written notice of termination.[15]

3. On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their ICA.[16] The PUC approved the amendment on January 26, 2001.[17] The Amendment provided for the purchase of UNE-E at the rate of $27.00 in Minnesota.[18] Unless the parties agree to an earlier date, the amendment expires on December 31, 2005.[19]

4. The rates for UNE-Star service were the same in the agreement with McLeod and Eschelon, even though the termination dates and the volumes differed significantly.

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[9] See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).
[10] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).
[11] Complaint, Ex. A-1 (Docket No. P-5340, 421/M-99-1223). Eschelon was formerly known as Cady Telecommunications, Inc. ("CMTI"), and Qwest was formerly known as U S West Communications, Inc. ("USWC").
[12] Complaint, Ex. A-2.
[13] Docket No. P-5323, 421/IC-00-1707.
[14] Complaint, Ex. A-2, Amendment 8, Attachment 3.2, p.7.
[15] Complaint, Ex. A-2, Amendment 8, p.2
[16] Complaint, Ex. A-3.
[17] Docket No. P-5340, 421/IX-00-1657.
[18] Complaint, Ex. A-3, Amendment 8, Attachment 3.2, p. 7.
[19] Complaint, Ex. A-3, § 1.10.

5. In September 2002, McLeod and Qwest entered into another amendment to their ICA, amending the price for UNE-M from $27.00 per month to $24.50 per month. In the amendment, Qwest gave notice of its intent to terminate the Agreement on December 31, 2003, and to meet to discuss conversion plans. In the event that McLeod did not convert services by December 31, 2003, the amendment specifies that the applicable rate would revert to the rate previously in effect ($27.00), as specified in October 26, 2000 agreement, and not the lower rate in this amendment.[20] The Amendment was approved by the PUC on February 7, 2003.[21]

6. Immediately upon learning of the amendment approved on February 7, 2003, Eschelon asked Qwest to give it the same UNE-Star rates that it made available to McLeod. Eschelon requested the price but not other provisions of Qwest's agreement with McLeod.[22]

7. Qwest has refused to give Eschelon the price negotiated with McLeod unless Eschelon agrees to the other terms and conditions set forth in the Qwest/McLeod agreement.[23] Although Qwest has offered to negotiate with Eschelon,[24] Eschelon has refused to negotiate unless Qwest agrees to give Eschelon the price given to McLeod, while retaining the same expiration date and volume commitments in Eschelon's current agreement with Qwest. [25]

IV. Jurisdiction

Eschelon asserted in its complaint that Qwest will not provide UNE-Star service to Eschelon on the same terms that Qwest provides UNE-Star to McLeod. Eschelon further asserts that it has a right to "pick and choose" among services and select UNE-Star service at the price negotiated with McLeod, but without accepting the termination date in the Qwest-McLeod agreement. In addition, Eschelon relies on the "most favored nation" clause contained in its ICA with Qwest. In essence, this is a restatement of the "pick and choose" provision of federal law, but it is also an enforceable provision of the ICA.[26]

Qwest contends in response that Eschelon is not properly asserting an opt-in claim because it refuses to accept other material terms and conditions that are included in the Qwest-McLeod agreement. Because there is no opt-in claim, Qwest asserts that there is no dispute properly before the PUC. Qwest seeks an order directing the parties to negotiate an amendment to their interconnection agreement pursuant to 47 U.S.C. § 251(c).

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[20] Complaint, Ex. A-5.
[21] Docket No. P-5323, 4212 IC-02-1566.
[22] Complaint, Ex. B-5, p. 5.
[23] Complaint, Ex. B-6; see also Corbetta Letter, Ex. 3 to Eschelon's Initial Brief.
[24] Complaint, Ex. B-7, p. 7.
[25] Complaint, para. 9.
[26] Eschelon Brief, Ex. 4, p. 627.

The "pick and choose" provision of the Act is contained in 47 U.S.C. § 252(i), which provides as follows:

> [A] local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as provided in the agreement.[27]

The applicable regulation of the Federal Communications Commission (FCC) states that the "pick and choose" provision will not apply:

> where the incumbent LEC proves to the state commission that: (1) The costs of providing a particular ... service ... to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.[28]

Not only does the federal law confer jurisdiction on the commission to sort out these issues, but the ICA between Qwest and Eschelon specifically states that the PUC shall implement and enforce the Agreement. It says that the PUC has continuing jurisdiction:

> [t]o implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution.[29]

Eschelon contends that Qwest has violated the so-called "most favored nation" provision of their ICA. Under Eschelon's ICA, Qwest must provide network elements to Eschelon on rates, terms and conditions no less favorable than those provided to itself or any other party.[30] Although Qwest disputes that the ICA has been breached, that is Eschelon's claim. Thus this is a dispute "arising out of or relating to this Agreement," and the PUC clearly has jurisdiction to address it.

Eschelon has properly asserted a claim that Qwest violated its opt-in rights. The issue for the PUC is what terms, if any, are legitimately related to the

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[27] 47 U.S.C. § 252(i).
[28] 47 C.F.R. § 51.809 (b) (emphasis added).
[29] Complaint, Ex. A-1, § 11.1, "Dispute Resolution."
[30] Eschelon ICA, attached as Ex. 2 to Eschelon's Initial Brief, Part A, Part III, Sec. 37, pp. 28-29.

price Qwest has given McLeod, and whether Eschelon is entitled to the price without the additional terms.

V. Eschelon Is Entitled to the Price Reduction Given to McLeod for the Time Period That it is Available to McLeod.

As stated above, section 252(i) of the Telecommunications Act requires service, or network element to any requesting carrier on the same terms. The implementing regulation provides that an ILEC:

> "shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act *upon the same rates, terms, and conditions as those provided by the agreement.*"[31]

Eschelon claims that it is entitled to the lower rate for UNE-Star for the duration of its agreement with Qwest, and not for the shorter period of the agreement between Qwest and McLeod. It rests its argument on the fact that prior to the amendment with McLeod, Qwest gave both Eschelon and McLeod the rate of $27.00 for UNE-Star, even though the duration of the two agreements was different. Thus, Eschelon claims, the price could not have been tied to the duration of the agreement.

In determining whether Qwest has properly required Eschelon to accept the same time limitation, one must determine if the duration is "legitimately related" to the price.[32]

The specific language of the amendment between Qwest and McLeod clearly links the lower price to a definite, short time period. The amendment states:

> In accordance with Section 1.10, Qwest hereby gives advance written notice of the termination of this Amendment effective December 31, 2003.... In the event that McLeodUSA does not, by December 31, 2003, convert some or all of its services, ... the prices set forth in Attachment 3.2 of the Interconnection Agreement Amendment Terms, dated October 26, 2000 ("Prior Amendment") and not the prices set forth on Attachment 3.2 hereto, shall apply to all such services that McLeod USA has failed to so convert. Nothing contained herein shall be construed as agreement or assent on the part of Qwest to provide to McLeod USA, or any other party, subsequent to December 31, 2003, the services known

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[31] 47 U.S.C. § 81.09(a) (emphasis added). See also Minn. Stat. § 237.09, 237.121(a)(4).
[32] AT&T Corp. v. Iowa Utilities Bd, 525 U.S. 3 119 S.Ct. 721, 738 (1999).

as "UNE-M" described in and made available pursuant to the Prior Amenchnent (sic); provided, such services shall continue to be provided to McLeodUSA during a commercially reasonable conversion period.[33]

The applicable attachment contains the same limitation: "Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003." It sets the price for Minnesota at $24.50, but clearly states that the $27.00 rate will go back into effect after December 31, 2003.[34]

Agreeing to a lower rate of $24.50 for a short duration is significantly different than locking in the same low rate for a longer period. Granting Eschelon the lower price for two additional years would be more advantageous to Eschelon than to McLeod. And once Qwest granted the lower price to Eschelon, the lower price would arguably be available to McLeod for the longer duration as well. This is inconsistent with the tight time limit Qwest negotiated with McLeod. Thus, Qwest should only be required to offer the $24.50 rate to Eschelon for the same short time period, through December 31, 2003, and thereafter only as permitted under Qwest's agreement with McLeod. The record demonstrates that the duration of the McLeod agreement is, as Qwest asserts, "legitimately related" to the lower UNE-Star rate.

Eschelon asserts that Qwest can deny its request to take UNE-Star at the lower rate only if Qwest can show that the costs of providing the service to Eschelon are greater than the costs of providing service to McLeod or it is not technically feasible to do so, as spelled out in the federal regulations.[35] These provisions apply, however, only when the ILEC is denying service under the same rates, terms and conditions. Qwest is not denying service, it is disputing what the relevant terms and conditions are that legitimately relate to the price term. As explained above, the record demonstrates that the lower price is legitimately related to the duration of the agreement and Eschelon must accept the term if it wants the lower price.

Conversely, if Eschelon requests the lower price for the time period granted to McLeod, Qwest has not offered a basis to deny the request. Qwest has not shown that its costs to provide UNE-Star to Eschelon are greater than providing it to McLeod. The technical feasibility is not at issue since Qwest is already providing UNE-Star to Eschelon.

In addition to requiring Eschelon to accept the time limitation that applies to McLeod, Qwest would also require Eschelon to renegotiate other provisions of the Eschelon ICA that are not part of the McLeod agreement, including the termination date, Custom Call Management System (CCMS), the monthly

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[33] Complaint, Ex. A-5.
[34] Id.
[35] 47 C.F.R. § 51.809 (b).

recurring rate for AIN and non-recurring charges for UNE-Star.[36] Qwest admits that these items are not part of its ICA with McLeod. Since Eschelon wants to opt into a portion of the McLeod agreement, it should not be compelled to renegotiate its own agreement with Qwest. Qwest has not shown that these other terms are "legitimately related" to the lower price negotiated between Qwest and McLeod. Qwest cannot require McLeod's agreement and Eschelon's agreement to be identical. That would defeat the flexibility to select that is encompassed in the concept of "pick and choose."

Qwest further seeks dismissal of Eschelon's claims that Qwest's conduct in refusing to allow Eschelon to opt into the McLeod price term constitutes a violation (or a number of violations) of state and federal law. The finding of a violation, or a number of violations, would be relevant only to the assessment of an administrative penalty order, which the parties have not briefed or argued in this motion.

VI. The PUC Has the Authority to Require Qwest to Refund the Difference In Price to Eschelon.

Qwest finally asserts that Eschelon's claim for a nondiscriminatory rate, dating back to the time of its request, constitutes a claim for "damages" that the PUC lacks authority to award. It argues that the PUC's authority is prospective only and any retroactive relief constitutes a claim for money damages that must be presented in court with a right to jury trial. Contract law is not the appropriate framework for decision in this case. The relationship between the parties is governed by the statutes and regulations that closely proscribe the parties' relationship. One must look first to whether those statutes and regulations address the available remedy.

It is clear that the PUC has broad authority to find that a rate, toll, tariff, charge, or schedule unfairly affects telephone service and issue an order that is just and reasonable. This authority includes establishing reasonable rates and prices.[37] It follows that if Qwest improperly denied service to Eschelon for the period of time that Eschelon requested it, and the PUC determines that a lower price was required, the PUC could order Qwest to amend its past billing to reflect the lower rate. This could result in a refund or credit to Eschelon. To hold otherwise would give the ILEC an incentive to delay granting an opt-in request.

The Court of Appeals applied similar reasoning and concluded that the PUC has implied authority to order refunds under Minn. Stat. § 237.081.[38] If the Commission ultimately concludes that Qwest overcharged Eschelon, it cannot be

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[36] Eschelon's Initial Brief, Ex. 6.
[37] Minn. Stat. § 237.081, subd. 4.
[38] In the Matter of the Formal Complaint of the Members of the MIPA Against U.S. West Communications, Inc., No. CO-97-606 (December. 30, 1997) (unpublished opinion) (copy provided).

said, as a matter of law, that the Commission lacks the authority to compel Qwest to reduce those charges if it determines that is the just and reasonable result, and it may determine the method for Qwest to make the necessary adjustment to its billings.

The Qwest-Eschelon ICA specifies that damages and equitable relief are remedies available for breaches of the ICA,[39] and that the PUC has authority to enforce the ICA.[40] Although such an agreement may define the scope of the parties' rights relative to each other, the ICA cannot confer powers on the PUC beyond those allowed by statute. The distinction may be insignificant given the PUC's broad statutory authority to do what is "just and reasonable," but it is still important to note that the agreed upon remedies in the ICA cannot expand the PUC's statutory authority. The PUC's enforcement of the ICA is necessarily limited by its statutory authority.

The parties informed the Administrative Law Judge at the prehearing conference that the issues raised in this motion are separate and severable from a second issue still pending in this matter. The parties may request that this recommendation be bifurcated and forwarded to the PUC for appropriate action.

BJH

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[39] Complaint, Ex. A-1 § 10.4.
[40] Id., § 11.1.